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SUPREME COURT, U.S.
FILED
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IN THE

Supreme Court of the United States

..... TERM, 1959

No. 230

BERTRAND E. MOEBUS,

Petitioner,

against

PAUL TISHMAN CO., INC. and I. B. MILLER CONTRACTING CORP.,

Respondents,

HORN CONSTRUCTION CO.,

Respondent,

PAUL TISHMAN GENERAL CONTRACTOR, INC.,

Respondent.

BRIEF FOR RESPONDENTS PAUL TISHMAN CO., INC. AND I. B. MILLER CONTRACTING CORP. IN OPPOSITION

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Point I—There are no questions for review by this Honorable Court	4
Point II—	7
Conclusion	7
Appendix I	8

Cases Cited

Central Vermont R. Co. v. White, 238 U. S. 507	6
Chang-Kee v. United States, 70 U. S. 320, 326	5
Iowa Central Ry. Co. v. Iowa, 160 U. S. 389, 393	6
Life Insurance Co. v. Francisco (1873), 84 U. S. 672, 679	5
Market St. Ry. Co. v. Railroad Commission of California, 324 U. S. 548	6
Moffett v. Commerce Trust Co., 187 Fed. 2d 242, 248-249, cert. den. 342 U. S. 818	6
Thorington v. Montgomery, 147 U. S. 490, 494	6
Tripp v. Santa Rosa St. R. R., 144 U. S. 126, 130	6
Wiggins v. Gray, 65 U. S. 303, 306	5

Statute Cited

Section 1257(3) of 28 U. S. Code	2

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Opinions Below

The memorandum opinion of Special Term, New York Supreme Court, Kings County, is unreported.

The memorandum opinion of the Appellate Division of the New York Supreme Court, Second Judicial Department

(Appendix E, p. 15—Petitioner's Brief) is reported at 5 App. Div. 2d 786. Said Court's memorandum opinion denying the motion for reargument (Appendix F, p. 15—Petitioner's Brief) is reported at 5 App. Div. 2d 867.

The decision of the Court of Appeals of New York (Appendix G, p. 16—Petitioner's Brief) is reported at 5 New York 2d 945.

Jurisdiction

The order of the New York Court of Appeals dismissing petitioner's appeal was entered on February 26th, 1959.

Judgment for costs was entered thereon in the office of the Clerk of Kings County, New York, on April 24, 1959.

The petition for writ of certiorari was served on July 17, 1959.

Petitioner invokes the jurisdiction of this Court under Section 1257(3) of 28 U. S. Code.

Questions Presented

The question here presented is whether this Honorable Court will review a unanimous decision of a New York court exercising its discretion under a New York statute.

Statement of the Case

Petitioner sued for personal injuries alleged to have been sustained as the result of the negligence of respondents.

The alleged accident occurred on November 14, 1952.

Although the respondents Paul Tishman Co., Inc. (hereinafter referred to as Tishman) and I. B. Miller Contracting Corp. (hereinafter referred to as Miller) were available for service, petitioner did nothing with respect to the in-

stitution of his action against Tishman and Miller until two days prior to the expiration of the three year Statute of Limitations when, on November 12, 1955, he delivered the summons to the sheriff for service. The summonses were served on respondents Tishman and Miller on November 15, 1955 and November 22, 1955 respectively (R. 9).

Issue was joined by service of said respondents' answers on March 5, 1956.

Petitioner had not put the case on the calendar as of February 25, 1957, and by letter of that date, petitioner's attorney was advised that unless the action was discontinued or put on the calendar, a motion to dismiss would be made (R. 9).

Petitioner's attorney replied immediately, asking for two or three weeks to collate the necessary information.

When four months more had elapsed, during which time the petitioner did not act to put the case on the calendar, respondents Tishman and Miller, by notice of motion dated June 26, 1957, moved to dismiss the action of the petitioner for failure to prosecute, said motion being returnable July 24, 1957.

Prior to the return date of the motion, petitioner served his note of issue, affidavit of residence, doctor's affidavit and notice (R. 9).

Although it had been repeatedly held in New York by the appellate courts that an affidavit of merits, verified by the party, is necessary in opposition to a motion to dismiss the complaint for failure to prosecute the action, no such affidavit was submitted by petitioner. The only affidavit submitted by petitioner was a pro forma affidavit by an attorney associated with petitioner's atforney (R. 15-16). No additional time was requested to supply such affidavit.

Special Term denied respondents' motion but on appeal, the Appellate Division reversed the order of Special Term

and granted the motion dismissing the complaint on the ground that there was an improvident exercise of discretion as there was no affidavti of merit or excuse for delay in prosecuting the action (Appendix E, p. 15—Petitioner's Brief).

The Court of Appeals of the State of New York dismissed the petitioner's appeal to that Court on the ground that the only question presented involved a non-reviewable exercise of discretion (Appendix G, p. 16—Petitioner's Brief).

POINT I

There are no questions for review by this Honorable Court.

Petitioner presents three questions for review by this Honorable Court (p. 2—Petitioner's Brief).

1.

Petitioner contends, in substance, that Special Term, in ruling in his behalf in denying respondents' motion, denied is attorney the opportunity for oral explanation of material not in the affidavit submitted by the attorney in opposition to respondents' motion and not sworn to by petitioner, and in so doing, denied him due process under the Fourteenth Amendment of the United States Constitution.

In so arguing, petitioner ignores the provisions of Rule 12(f), Special Term Rules, Supreme Court, Kings County (Appendix I—this Brief) that all papers must be submitted to the Court before oral argument and overlooks the fact that oral argument on a motion is not an inherent right.

Obviously, the reason for Rule 12(f) is that the Court cannot, as pointed out by the Court of Appeals on the argument before it, consider as part of the record the unverified statements of counsel on oral argument.

The Court of Appeals made a similar observation with respect to the attempt by petitioner's counsel to include, in an appendix to his brief in the Court of Appeals, papers not submitted to Special Term and not a part of the Record on Appeal before the Court of Appeals. (In this connection it is to be noted that on p. 4 of Petitioner's Brief, he sets forth facts not found in the Record on Appeal.)

The practical basis for this reasonable rule is to regulate practice before the court so that each party may be confronted only by sworn affidavits and not by unsworn statements of material withheld or not included which may surprise one's adversary (see *Life Insurance Co.* v. *Francisco* (1873), 84 U. S. 672, 679).

No constitutional rights of petitioner were denied by Special Term.

2.

Petitioner argues that the Appellate Division abused its discretion.

This Court has held, as did the New York Court of Appeals in this case, that it has no review of matters within the discretion of the courts below, even if it should disagree with the holding of said courts (*Wiggins* v. *Gray*, 65 U. S. 303, 306; *Cheang-Kee* v. *United States*, 70 U. S. 320, 326). Especially is that true where there was, as here, a unanimity of decision by the judges in the court below (*Wiggins* v. *Gray*, 65 U. S. 303, 306).

Plaintiff, who failed to explain why there was a delay of almost three years in commencing his action, a delay of twenty months after joinder of issue, and a delay of four months after his attorney was notified by respondents' counsel that a motion to dismiss the complaint for failure to prosecute would be made, before he placed the case on the calendar, is contending here that five judges of the Appellate Division, in a unanimous decision, abused their

discretion in agreeing that petitioner had failed to present facts excusing his delay and in holding that he failed to comply with the rule that an affidavit of merit be submitted.

As the 8th Circuit aptly stated in *Moffett* v. *Commerce Trust Co.*, 187 Fed. 2d 242, 248-249, cert. den. 342 U. S. 818, this complaint is not uncommon to defeated litigants.

In the case at bar there is merely a failure by five appellate judges to agree with petitioner's interpretation as to what constitutes unreasonable neglect in prosecuting his action.

3.

The substance of petitioner's argument is that the New York Court of Appeals erred in its application of a New York statute, Section 602, Civil Practice Act (Appendix C, p. 12—Petitioner's Brief) to the order of the Appellate Division.

Section 181 of the Civil Practice Act and Rule 156, Rules of Civil Practice (Appendices A and B, p. 11—Petitioner's Brief) specifically provide that the dismissal of the complaint under such section and rule shall be in the discretion of the Court, so there was no erroneous application of Section 602 by the Court of Appeals.

Aside from the merits, however, this Court has held that whether a state statute has been properly construed or applied by the court of last resort of that state is not subject to review by this Court (*Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393).

Matters of procedure are governed by the law of the forum and a decision of the state court on such matters will not be reviewed by this Court (*Tripp* v. *Santa Rosa St. R. R.*, 144 U. S. 126, 130; *Central Vermont R. Co.* v. *White*, 238 U. S. 507; *Market St. Ry. Co.* v. *Railroad Commission of California*, 324 U. S. 548; *Thorington* v. *Montgomery*, 147 U. S. 490, 494).

POINT II

It is submitted that there is no compliance here by petitioner with Rule 19, subd. 1, Rules of the Supreme Court of the United States, since it does not appear that the Court of Appeals of New York State has decided a federal question of substance not heretofore decided by this Court or has decided it in a manner not in accord with the applicable decisions of this Court.

Rather, there is involved only the discretionary decision of a state court in the regulation of the practice in the state courts in accordance with the statutes and rules of practice applying in such courts. Similar provision is found in Rule 41(b), Fed. Rules of Civil Procedure.

Moreover, it cannot be said that a unanimous decision by a five judge bench is an abuse of discretion. The decision is in accordance with New York law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents,
Paul Tishman Co. Inc. and
I. B. Miller Contracting Corp.

JOHN NIELSEN,
Of Counsel.

Appendix I.

Supreme Court, Kings County

Rule 12, Special Term, Part I.

(a) In Special Term, Part I, there shall be heard all litigated motions or contested motions or applications except those directed by these rules to be heard in other parts. • • •

(f) Unless otherwise directed by the justice presiding, no motion will be heard: (1) Unless the moving papers and all papers in opposition are ready for submission at the time of argument, and (2) unless each party has served on the adverse parties a copy of every affidavit and memorandum to be submitted to the court.